United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7301

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7301

B
P/S

LEHIGH VALLEY INDUSTRIES, INC. and
LEHIGH COLONIAL CORPORATION,

Plaintiffs-Appellants,

-against-

NORMAN BIRENBAUM,

Defendant-Appellee,

-and-

DAVID BIRENBAUM, INTERNATIONAL DAVID,
S.A. and LYDIA, S.A.,

Defendants.

Appeal from a Judgment of the United
States District Court for the Southern
District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

III. TREATISES:

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STATEMENT OF PROCEEDINGS BELOW

This action for breach of fiduciary duty and breach of contract was commenced by the filing of a summons and complaint on January 24, 1974. Jurisdiction is based on diversity of citizenship. The summons and amended complaint were served on the defendant Norman Birenbaum ("Norman") in Haverhill, Massachusetts on

February 15, 1974. On May 6, 1974 Norman moved to dismiss the complaint for lack of personal jurisdiction. (A 53.)[1/] By a memorandum and order dated January 29, 1975, District Judge Charles E. Stewart, Jr., granted Norman's motion to dismiss. (A 72-94; 389 F. Supp. 798.) By order dated May 2, 1975 and entered on May 6, 1975, Judge Stewart made his decision and order of January 29th a final order as to Norman thereby permitting an appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (A 102.) On May 20, 1975 plaintiffs filed their notice of appeal to this Court. (A 103.)

QUESTIONS PRESENTED

1. Though appellee is a non-resident and executed his employment contract in Massachusetts, is he nonetheless subject to the in personam jurisdiction of the New York courts under CPLR §302(a)(1) by virtue of the fact that substantial negotiations were conducted in New York by appellee's

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1/All references to the Joint Appendix filed in conjunction with this brief will be referred to by the letter "A" followed by the particular page number(s).

agent to fix the terms and conditions of his employment contract?

2. Where a subsequent Settlement Agreement released appellee from all obligations owed to appellants but reinstated and reaffirmed the employment relationship and adopted and carried forward the terms and conditions of the prior employment contract, do claims alleging breach of the employment contract after the date of the Settlement Agreement "arise out of" the Settlement Agreement such that appellee's transaction of business in New York in connection with the negotiations for and execution of the Settlement Agreement support in personam jurisdiction over him pursuant to CPLR §302(a)(1)?

3. When appellee entered New York ostensibly to transact business in his capacity as the representative of a corporation, but during his sojourn in New York he engaged in acts in violation of his fiduciary duties and in furtherance of a conspiracy to destroy the business of said corporation for his own personal benefit, did appellee thereby subject himself to the in personam jurisdiction of the New York courts under CPLR §302(a)(1) for any claims arising out of his acts in furtherance of the conspiracy and in violation of his fiduciary duties?

4. Did appellee, the vice president of a wholly owned Massachusetts subsidiary of appellants, who allegedly engaged in conduct designed to destroy the business of the Massachusetts corporation to the direct financial detriment of appellants, cause direct injury to appellants in New York within the meaning of CPLR §302(a)(3)(ii)?

5. Where appellee allegedly engaged in tortious conduct outside of New York which caused injury in New York and is the sole stockholder of a corporation engaged in interstate commerce, which corporation was used by appellee to further his tortious activities against appellants, can the income of that corporation be attributed to appellee for purposes of satisfying the substantial revenue requirement of CPLR §302(a)(3)(ii)?

6. Did Judge Stewart err in holding that appellants had not proven the existence of a conspiracy between appellee and his brother — co-defendant so that the actions of the brother could be attributed to appellee to satisfy the jurisdictional requirements of CPLR §302(a)(3)(ii)?

7. Was appellee's conduct in sending a false statement from outside New York into New York where it was relied upon sufficient to support in personam jurisdiction over him pursuant to CPLR §302(a)(2)?

8. To the extent that disposition of the legal questions raised by appellee's motion to dismiss was dependent upon the resolution of factual issues, did the district court commit error when it summarily resolved those issues against appellants without first having granted appellants' requests for discovery and a hearing?

STATEMENT OF THE CASE

1. The Allegations of the Amended Complaint.

Plaintiffs, Delaware corporations with principal offices in New York, bring this action against two Massachusetts citizens, David Birenbaum ("David") and his brother Norman, and two Spanish corporations, International David, S.A. and Lydia, S.A.

The amended complaint (A 5-17), which at this stage of the proceedings must be taken as true (Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 353 F. Supp. 264, 268 (S.D.N.Y. 1972)), alleges that Norman and his brother David were the principal owners of seven Massachusetts corporations engaged in various aspects of the shoe business. In 1968 Norman and David sold their stock in these corporations to appellant Lehigh Valley Industries, Inc. ("Lehigh") through a wholly owned subsidiary of the latter, appellant

Lehigh Colonial Corporation ("Colonial").[2/] The sale of the Birenbaum stock to appellants is embodied in a document entitled "Reorganization Agreement", dated July 19, 1968. (A 18-39.)

Negotiations for the sale of these corporations by the Birenbaums to appellants took place over a substantial period of time in the offices of Lehigh in New York City. (A 67.) The principal negotiator for the sellers was David. (A 65-55.) A critical aspect of these negotiations was the retention of Norman and David as chief operating officers of one of the subsidiaries -- Colonial Shoe Ornament Co., Inc. ("Ornament"). Employment agreements were in fact negotiated between appellants and the Birenbaums and were executed on October 18, 1968. (A 40-49.) Norman signed his contract in Massachusetts. Both he and David received five year contracts calling for a salary of $60,000 per year, and they continued as vice president and president, respectively, of Ornament. Appellants contend that although the negotiations were handled principally by David, the latter was acting as Norman's agent.

2/Two other individuals, Sol and Evelyn Schwartz, who owned a small percentage of the seven Massachusetts corporations, also sold their stock to Lehigh through Colonial.

The amended complaint alleges that both David and Norman failed to fulfill the terms of their employment agreements by failing to devote their full time, skill and attention to the affairs of Ornament (¶25). The amended complaint further alleges that both David and Norman abused their positions of trust in Ornament by diverting the assets and business opportunities of Ornament to their own use and benefit (¶¶ 16, 41, 43, 49, 55). Norman is charged with active breaches of fiduciary duty in that he failed to bring to the attention of the board of directors of Ornament (or Colonial or Lehigh) the egregious conduct of his brother David of which, it is alleged, he was fully aware (¶¶ 46 and 47). It is further alleged that Norman engaged in a conspiracy with his brother to destroy the business of Ornament and to profit thereby (¶49). His failure to apprise Ornament's board of directors of his brother's activities contrary to the best interests of the company represents the most salient conduct in furtherance of this conspiracy.

Moreover, it is alleged that during Norman's tenure as an officer of Ornament he diverted a business opportunity of Ornament to his own profit by inducing Ornament, with David's assistance, to abandon its leather stripping line of business and then stepping into that

business himself. (¶¶ 51-55.)[3] Norman was the officer in charge of Ornament's leather stripping business. It is alleged and supported by affidavit (A 68-70) that David, on behalf of himself and Norman, urged appellants to take Ornament out of the leather stripping business. In reliance on the statements and representations of Norman and David, appellants caused Ornament to discontinue its leather stripping business operations. Norman thereupon established a leather stripping business of his own which he called the Louran Corporation ("Louran") and took over the former business of his employer Ornament -- including customers. Norman admits that immediately following the termination of his employment with Ornament he embarked upon the leather stripping business. (Affidavit of Norman in Support of Motion to Dismiss, ¶5; A 55.)

2. Norman's Contacts with New York

Although Norman did not personally come to New York to negotiate with Lehigh concerning the terms and conditions of his employment contract, it is alleged that

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3/The usurpation of customers by a fiduciary during his tenure as such represents one of the most flagrant breaches of fiduciary duty. See Duane Jones Co. v. Burke, 306 N.Y. 172, 187-189, 117 N.E.2d 237, 244-46 (1954).

the terms of said contract were negotiated and fixed on his behalf in New York by his agent, his brother David. (A 67.) David negotiated notonly the terms of his own employment agreement with Ornament but also those of Norman's employment agreement. In fact, Norman took no part whatsoever in the negotiations with Lehigh concerning the terms of his employment contract, yet when that document was presented to him for execution he immediately signed it. (A 67.) The ineluctible conclusion to be drawn from this set of facts is that David functioned as his brother's agent with respect to the formulation of the employment agreement which, it is alleged, Norman breached. Clearly, then, Norman may be charged with David's business activities in New York with respect to negotiating the employment agreement insofar as David acted as Norman's agent.

The foregoing conclusion is fortified by the fact that Norman admits he came to New York on three occasions to negotiate the terms of the March 6, 1972 Settlement Agreement. (See ¶8(b) of his affidavit; A 56.) That Agreement (A 60-64), executed in New York, in paragraph 6 reaffirmed the validity and controlling effect of the October 18, 1968 employment contract which the amended complaint alleges has been breached.

Norman also admits making business trips to New York subsequent to March 6, 1972. (A 58-59.) Appellants offered detailed proof as to four such trips in a period of nine months during 1972. (A 70.) While Norman asserts that such trips were in conjunction with his duties on behalf of Ornament, appellants contend that Norman was in fact at all times operating as a faithless fiduciary in furtherance of the conspiracy to benefit himself and his brother. For example, in December 1972 in New York he and David used the occasion of a Lehigh Christmas party-business meeting to urge abandonment of the leather stripping business as part of their plan to appropriate part of the business of Ornament for themselves. It is also alleged that the conspirators, through David, were engaged in making false representations in New York in order to further the objects of the conspiracy.

3. The Opinion Below

In his decision and order of January 29, 1975, Judge Stewart considered each of the appellants' contentions and dismissed them as insufficient to support in personam jurisdiction over Norman.

A. 302(a)(1) Jurisdiction

Judge Stewart first considered whether David, acting arguendo as Norman's agent, transacted business in New York State for purposes of CPLR 302(a)(1). Judge Stewart determined that David's negotiation of Norman's employment contract did not constitute a sufficient transaction of business to vest a New York court with in personam jurisdiction over Norman. (A 79; 389 F. Supp. at 802.) While Judge Stewart expressed some doubt as to whether David should be regarded as Norman's agent for purposes of negotiating the employment contract, he found it unnecessary to reach that issue in view of his determination that David's negotiations did not satisfy the minimal contacts required by CPLR 302(a)(1). (A 80; 389 F. Supp. at 803.)

Next Judge Stewart addressed himself to the question of whether Norman's participation in negotiations over the March 6, 1972 Settlement Agreement constituted the transaction of business in New York for purposes of satisfying CPLR 302(a)(1). He concluded that Norman's involvement in those negotiations did constitute the transaction of business in New York. (A 81; 389 F. Supp. at 803.) However, he decided that the settlement and the negotiations over it were separate and distinct from Norman's employment

contract which he allegedly breached. Even though the Settlement Agreement reaffirmed and carried forward the terms, conditions and obligations of the employment contract, the court held that the appellants' claims did not arise out of Norman's transaction of business in New York in connection with the Settlement Agreement. (A 81; 389 F. Supp. at 803.)

The third aspect of the transaction of business issue which Judge Stewart considered was the various trips made by Norman to New York after the date of the Settlement Agreement. Although appellants contended that during these trips Norman engaged, at least in part, in activities designed to further the conspiracy to destroy Ornament for his own benefit, Judge Stewart accepted statements by Norman in his affidavit that these trips to New York were solely in his capacity as an officer of Ornament. Relying on a line of decisions holding that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation, Judge Stewart rejected appellants' argument that these visits by Norman constituted a sufficient transaction of business for purposes of CPLR 302(a)(1). (A 82-83; 389 F. Supp. at 803-804.)

B. 302(a)(3)(ii) Jurisdiction

The court, agreeing with appellants, held that commercial tortious conduct committed outside New York comes within the ambit of 302(a)(3)(ii) jurisdiction, provided that the other statutory criteria are satisfied. (A 83-84; 389 F. Supp. at 804.) Accordingly, Judge Stewart considered whether the acts alleged to have been committed by Norman outside of New York caused injury in New York. Appellants argued below that except for its corporate shell Ornament was virtually indistinguishable from appellants and that because of the financial structure of the Lehigh organization the injury inflicted by Norman, realistically viewed, was suffered only by Lehigh in New York. Judge Stewart held, however, that the corporate veil between appellants and Ornament could not be pierced for this purpose and the situs of any injury was Massachusetts. (A 84-86; 389 F. Supp. at 804-805.) Judge Stewart also held that the appellants had failed to satisfy the second prerequisite for finding 302(a)(3)(ii) jurisdiction, to wit, that Norman received substantial revenue from interstate or international commerce. The court refused to pierce the corporate veil of Louran in order to attribute its interstate business to Norman, its sole shareholder. (A 87; 389 F. Supp. at 805.)

Judge Stewart then considered appellants' argument that any acts committed by David in furtherance of the alleged conspiracy should be attributed to Norman for jurisdictional purposes because of the conspiracy between them. While the court agreed that attribution among co-conspirators was appropriate for purposes of 302(a)(3)(ii) jurisdiction (A 91; 389 F. Supp. at 806-807), Judge Stewart held that appellants had failed to prove the existence of any such conspiracy. Because of the nature of this finding, Judge Stewart found it unnecessary to consider whether CPLR 302(a)(3)(ii) requires that the individual defendant over whom long-arm jurisdiction is asserted need meet the requirements of substantial interstate or international revenue or whether it is sufficient that the co-conspirator meets the requirement. (A 93; 389 F. Supp. at 807.)

C. 302(a)(2) Jurisdiction

Last of all, Judge Stewart considered whether the sending of a false statement into New York from out of state constitutes a tort committed within New York under CPLR 302(a)(2). Judge Stewart rejected authority holding that the sending of such a false statement into the state constitutes a tortious act committed within New York and instead

interpreted the New York Court of Appeals decision in Kramer v. Vogl, 17 N.Y.2d 27, 215 N.E.2d 154, 267 N.Y.S.2d 900 (1966), as holding to the contrary. He therefore found that jurisdiction could not be based upon 302(a)(2). (A 94; 389 F. Supp. at 808.)

For all of the above reasons, Judge Stewart concluded that in personam jurisdiction over Norman could not be exercised by a court located in New York. He therefore granted Norman's motion to dismiss and made his order a final one under Rule 54(b).

ARGUMENT

INTRODUCTION

As presently constituted CPLR 302(a) provides, in relevant part:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> * * *
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . .

Jurisdiction over Norman is predicated on CPLR 302(a)(1), 302(a)(2) and 302(a)(3)(ii). It is appellants' position that the conduct of Norman, personally and through his agent and co-conspirator David, satisfies the requirements of CPLR 302 sufficient to subject him to the jurisdiction of the New York courts without violating due process standards. Norman is a defendant on the first, third, sixth, seventh and eighth claims for relief alleged in the amended complaint. It is our submission that jurisdiction lies as to each under the following provisions of the CPLR:

Claim	Subject	CPLR Section Supporting Jurisdiction
First	Conspiracy	CPLR 302(a)(3)(ii)
Third	Breach of Employment Contract	CPLR 302(a)(1)
Sixth	Breach of Fiduciary Duty	CPLR 302(a)(1) and CPLR 302(a)(3)(ii)
Seventh	Conspiracy	CPLR 302(a)(3)(ii)
Eighth	Appropriation of Business Opportunity	CPLR 302(a)(1) CPLR 302(a)(2) and CPLR 302(a)(3)(ii)

Since the criteria for determining the extent to which a faithless fiduciary can be subjected to the jurisdiction of the New York courts under CPLR 302 have not yet been established by judicial interpretation, the precedents can only be viewed as signposts to a determination of this appeal. Appellants urge that the circumstances of this case present a fitting subject for the exercise of long-arm jurisdiction. The charges of the amended complaint are not of a variety such as the negligent or inadvertent commission of acts subsequently found to be injurious to Lehigh and Ornament, the beneficiaries of Norman's fiduciary duties. Rather, what is alleged is a deliberate and systematic effort to squander the corporate assets of Ornament in such a fashion that, in fact, Ornament and Lehigh were being intentionally milked for the personal benefit of Norman and David. Such conduct represents the most egregious violation of fiduciary duty. As Justice Cardozo stated during his tenure as Chief Judge of the New York Court of Appeals:

> 'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. . . . Only thus has the level of conduct for fiduciaries been kpet at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546-47 (1928).

It is an intentional and wanton breach of this sensitive and revered duty which is charged against Norman. The beneficiary of this fiduciary duty was not only Ornament, but also the sole stockholder of Ornament, Colonial and its parent Lehigh. See Kreitner v. Burgweger, 177 App. Div. 48, 160 N.Y.S. 256 (4th Dept. 1916); Gould v. Jacobs, 44 Misc.2d 990, 256 N.Y.S.2d 20 (Sup. Ct., N.Y. Co. 1964), aff'd, 24 A.D.2d 934, 263 N.Y.S.2d 1004 (1st Dept. 1965). The malefactions alleged against Norman, therefore, worked an inimical effect on a New York resident. This direct effect of intentional conduct strongly argues in favor of the exercise of long-arm jurisdiction in this case for New York has a valid constitutional interest in enforcing the rights of its residents. See McGee v. International Life Ins. Co., 335 U.S. 220, 223 (1957).

I. NORMAN BIRENBAUM ENGAGED IN THE TRANSACTION OF BUSINESS IN NEW YORK, INDIVIDUALLY AND THROUGH HIS AGENT BROTHER, IN CONNECTION WITH HIS EMPLOYMENT CONTRACT, AND THE CLAIMS ALLEGED IN THE AMENDED COMPLAINT ARISE OUT OF THE BREACH OF THAT CONTRACT.

A. The Employment Contract

Judge Stewart held that David's negotiations with Lehigh in New York concerning the terms of Norman's employment contract were insufficient to vest the district court with *in personam* jurisdiction over Norman. He found that "plaintiffs have not shown that David did anything more than 'negotiate' identical form contracts for him and for Norman when he was in New York." (A 78; 389 F. Supp. at 802.) Appellants contend that the New York courts would not be as begrudging as Judge Stewart in their interpretation of the minimal contacts necessary to constitute a transaction of business under CPLR 302(a)(1).

The question of minimal contacts must of necessity always turn on the individual factual situation, for the critical question always presented is whether the defendant (or his agent) engaged in any conduct within the forum state such that the defendant may be said to have "purposefully availed [him]self of the privilege of conducting activities within the forum state, thus invoking

the benefits and protections of its laws" to the degree that the maintenance of the suit in the forum state does not offend traditional notions of fair play and substantial justice. Hanson v. Denckla, 357 U.S. 235, 253 (1958). International Shoe Co. v. Washington, 326 U.S. 310 (1945). See Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, cert. denied sub nom. Estwing Manufacturing Co. v. Singer, 382 U.S. 905 (1965).

In the case at bar virtually all the negotiations leading up to the sale of stock and attendant employment contracts were conducted at Lehigh's offices in New York. These negotiations were not desultory or accidental or insubstantial with respect to the ultimate transactions growing out of them. Instead, these negotiations were substantial and carried out over a long period of time (A 67). Although Norman may have affixed his signature to the employment contract in Massachusetts, that act formed but a minor part in the totality of the transaction. Up to that time, the situs of the transaction was in New York. See Longines-Wittnauer Watch Co. v. Barnes & Reinecke, supra at 457; 209 N.E.2d at 75-76; 261 N.Y.S.2d at 18-19.

The fact that the negotiations conducted by David

were "preliminary" to the ultimate contract does not derograte from their centrality in the context of the transaction as a whole. Id. Without those negotiations there would have been no sale of stock and no employment contract.

Moreover, for jurisdictional purposes, it is important to emphasize the protracted, continous and substantial nature of the negotiations. The sale of stock and employment contract did not arise from a one-shot meeting sealed with a handshake. During the course of the negotiations David had a virtual continuous presence in New York, and it does not ring true to say that the employment contract out of which this action arises was not itself created by the transaction of business in New York.

In Harry Winston, Inc. v. Waldfogel, 292 F. Supp. 473 (S.D.N.Y. 1968) a defendant had made two trips to New York to negotiate the purchase of a diamond ring. The defendant did not deny the trips but urged that the contract itself was never consummated. The court, notwithstanding that no other contacts were shown and that the contract itself was never consummated, held that the negotiations constituted a prima facie showing of a transaction of business sufficient to sustain jurisdiction. In an analogous case, Thompson v. Ecological Science Corp., 421

F. 2d 567 (8th Cir. 1970), the Eighth Circuit Court of Appeals sustained long-arm jurisdiction upon a showing that the agents of a defendant foreign corporation were in the state for two days for negotiations leading up to the execution of a contract which they then allegedly breached. The fact that the final contract was executed out of state was held by the court to be immaterial. See also Strasser, Spiegelberg, Fried & Frank v. Schlesinger, 53 Misc.2d 78, 278 N.Y.S.2d 427 (Sup. Ct. N.Y. Co. 1967) (wife's retention of New York counsel to negotiate settlement with husband's counsel in New York sufficient to subject husband to 302(a)(1) jurisdiction even though he never came to New York and divorce action was actually pending in the Virgin Islands); Benedict Corp. v. Epstein, 47 Misc.2d 316, 262 N.Y.S.2d 726 (Sup. Ct. Albany Co. 1965) (note holder's designation of Albany as place for payment rendered guarantor, who signed the guaranty in Massachusetts and had no New York contacts, subject to jurisdiction of New York courts for suit on guaranty).

The negotiations which David engaged in with Lehigh in New York were far more extensive than the negotiations which were deemed sufficient to sustain jurisdiction in Waldfogel and Ecological Science. They extended

over a period far greater than two days and involved a subject matter of far more complexity and import than a diamond ring. We submit that this case in fact falls within the ambit of sufficient minimal contacts suggested by the decisions in Longines-Wittnauer Watch Co. v. Barnes & Reinecke, supra and Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967).

Further support for our position is found in the decisions in Security National Bank v. Republic National Life Ins. Co., 364 F. Supp. 585, 589 (S.D.N.Y. 1973) and National Bank of North America v. Bennett, 71 Civ. 2021 (S.D.N.Y. May 23, 1974) (Lasker, J.). Those cases hold that if a person, individually or through an agent, engages in purposeful conduct in New York in connection with a given transaction (e.g., the Reorganization Agreement), which transaction becomes "inextricably linked" to a second transaction out of which the asserted causes of action arise (e.g., Norman's employment contract), the activities undertaken in furtherance of the first transaction may serve as the basis for exercising long-arm jurisdiction with respect to claims for relief arising out of the second transaction.

In our case Norman admits executing the Reorganization Agreement in New York. (Affidavit ¶8(a); A 56.) There is

no dispute concerning the fact that that agreement was negotiated in New York between Lehigh and David, acting for all of the sellers. By its own terms, the Reorganization Agreement is inextricably linked to the subsequent employment contract between Norman and Ornament out of which most of the claims for relief against Norman arise. It is an accepted proposition of New York law that the making in New York of a contract is alone sufficient to serve as a basis for the exercise of long-arm jurisdiction under 302(a)(1) as to any causes of action arising out of the contract. Security National Bank v. Republic National Life Ins. Co., supra at 588 and cases there cited. We submit therefore that Norman's presence in New York in connection with the execution of the Reorganization Agreement, to which his employment agreement was an exhibit and which made the execution of the employment contract a condition precedent to the closing of the sale of the Massachusetts corporations to Lehigh and Colonial, is itself a sufficient basis for the exercise of 302(a)(1) jurisdiction over Norman for all claims arising out of the breach of the employment contract.4/

4/Although this argument was advanced in the court below, Judge Stewart made no reference to it in his opinion.

While there are always distinctions in the factual patterns of cases involving 302(a)(1) jurisdiction, the crucial consideration is one of due process and fairness. We submit that here there can be no question but that in the circumstances of this case it is entirely fair and reasonable to subject Norman to the jurisdiction of a New York court. Consequently, Judge Stewart's finding that the appellants failed to demonstrate that Norman, in person and through David, transacted business in New York within the meaning of CPLR 302(a)(1) with reference to the employment agreement should be reversed.

Because of his finding on the issue of the transaction of business, Judge Stewart did not reach the question whether David may properly be regarded as Norman's agent for purposes of negotiating the employment contract. Under the circumstances of the instant case, we submit David's conduct is attributable to Norman for jurisdictional purposes. The agency comprehended by CPLR 302 necessary to bring a nondomiciliary within the jurisdiction of the New York courts based on the acts of another need not be an agency in the strict textbook sense. In a recent case Justice Gellinoff observed that "the Court of Appeals has noted that 'realities' rather than formal agency requirements are the

test when a third-party seeks to base jurisdiction over the non-resident defendant on the acts of his purported agent [Parke-Bernet Galleries v. Franklin, 26 N.Y.2d 13, 19, 19n (1970)]." Legros v. Irving, 77 Misc.2d 497, 499, 354 N.Y.S.2d 47, 50 (Sup. Ct. N.Y. Co. 1973). See also, American Broadcasting Companies, Inc. v. Hernreich, 40 A.D.2d 800, 338 N.Y.S.2d 146 (1st Dept. 1972).

Looking at the "realities" of the instant case, one cannot escape the conclusion that David acted as Norman's agent with respect to the employment agreement. Norman did not participate in the negotiations. Nevertheless, when the employment agreement was presented to him for his signature, he signed forthwith. Even if Norman never formally appointed David as his agent to negotiate the employment contract, by signing the contract Norman ratified David's acts. It is an established principle of the law of agency that one cannot retain the fruits of representations and at the same time repudiate the agency and methods which brought them into being. Green v. Des Garets, 210 N.Y. 79, 103 N.E. 964 (1913); La Belle Heights, Inc. v. Stone, 227 App. Div. 65, 237 N.Y.S. 51 (1st Dept. 1929). Here Norman accepted the fruits of David's negotiations. He cannot now be allowed to claim that those negotiations were

not conducted on his behalf.[5/]

Moreover, in order to make out a ratification, it is only necessary to show that in accepting the benefits the principal had knowledge of the material facts and circumstances and that he acted in light of such knowledge. First National Bank of Morrisville v. Starke Design, Inc., 11 A.D.2d 595, 200 N.Y.S.2d 708 (3d Dept. 1960); Flagg v. Nichols, 202 Misc. 1096, 115 N.Y.S.2d 7 (Sup. Ct. N.Y. Co. 1952), aff'd, 281 App. Div. 966, 120 N.Y.S.2d 917 (1st Dept. 1953), rev'd on other grounds, 307 N.Y. 96, 120 N.E.2d 513 (1954). It cannot seriously be contended that when Norman signed the employment contract he was ignorant of David's discussions with Lehigh on his behalf. Consequently, for purposes of jurisdiction under CPLR 302, even if Norman did not actually appoint David his agent to negotiate the contract, it can be said that the agency was created nunc pro tunc through ratification. See Restatement (Second) Agency §§82, 84(1). This is sufficient to satisfy the informal agency requirement of CPLR 302.

5/The theory that David acted as Norman's agent is further reinforced by David's actions on Norman's behalf with respect to the terms of Norman's resignation. See the Tardiff Affidavit in Opposition to the Motion to Dismiss ¶4, A 67.

B. The Settlement Agreement

Turning from the year 1968, when the employment contract was negotiated and executed, to 1972 when the parties entered into an agreement to settle a lawsuit brought by the sellers of the Massachusetts corporations against Lehigh, Colonial and the Massachusetts corporations, Judge Stewart found that Norman engaged in the transaction of business in New York in connection with the negotiations for and execution of the March 6, 1972 Settlement Agreement. However, in the opinion of the court below, the claims for relief which are grounded on the employment contract do not arise out of this transaction of business by Norman in New York. (A 80-81; 389 F. Supp. at 803.)

The Settlement Agreement contains a provision which specifically ratifies, reaffirms and carries forward Norman's 1968 employment contract. While the parties mutually released each other from all claims and liabilities, in effect wiping the slate between them clean, they did not want to sever their employment relationship. Standing alone the release provision would have abrogated Ornament's obligation to pay David and Norman and the latter's obligations to work for Ornament. Since the parties did not want to go their separate ways, but desired to maintain their employment

relationship, the Settlement Agreement provided as follows:

> "The foregoing release shall neither limit nor impair the rights of the parties under the employment agreements between . . . [Ornament and Norman and David] accruing from and after this date." (A 62-63.)

In effect, after releasing each other, the parties entered into new employment agreements by adopting the terms and conditions of the 1968 contracts and carrying them forward. While they could have executed new employment contracts as part of the settlement, the parties chose to reaffirm and carry forward the old contracts as the easy way of accomplishing the same purpose.

Because of the release provisions of the Settlement Agreement, all of the malefactions asserted against defendants in the amended complaint as a basis for damages must perforce have transpired after March 6, 1972. Norman's post-March 6, 1972 actions in violation of his employment contract and his fiduciary obligations relate directly to his commitment in the Settlement Agreement to continue to honor the 1968 employment contract. That commitment was part of the negotiated terms of settlement and part of the March 6, 1972 Agreement. Since Norman clearly engaged in the transaction of business in New York in connection with

the Settlement Agreement, post-March 6, 1972 breaches of the commitments made therein by Norman surely arise out of his transaction of business in New York in connection with the Settlement Agreement.

Judge Stewart's contrary view suffers from a misconception of the nature of the Settlement Agreement itself and from a misapplication of distinguishable case authority. Judge Stewart holds that a claim against Norman arising out of the settlement itself would lie, but a claim arising out of the employment contract does not. This conclusion is only logically possible on the premise that Norman's continued employment by Ornament was not a term or condition of the settlement, for, if it was, a breach of that condition would constitute a breach of the Settlement Agreement itself for which Judge Stewart concedes there is CPLR 302 jurisdiction. But we have seen how in fact the Settlement Agreement explicitly states in unequivocal language that Norman's continued employment by Ornament under the provisions of the 1968 contract was a condition of the settlement. We submit that the claims asserted in the amended complaint charging breach of the employment contract and of fiduciary duty constitute a clear breach of the aforequoted provision of the Settlement Agreement and arise out of Norman's negotiations for and execution of that Agreement in New York.

Judge Stewart held specifically, "we cannot find that plaintiffs' claims arise out of this settlement agreement." (A81; 389 F. Supp. at 803.) Citing Fontanetta v. American Board of Internal Medicine, 421 F.2d 355 (2d Cir. 1970), Judge Stewart stated his opinion that "the New York courts would find the settlement and negotiations over it to be separate and distinct from negotiations over the employment contract and the contract itself for purposes of meeting the 'arising out of' requirement of CPLR §302." Id. Judge Stewart erred in this holding.

The Fontanetta case is clearly distinguishable. There a physician plaintiff had taken two examinations administered by the defendant for certification as a specialist in internal medicine. One of the exams was written and one was oral. The written exam — which he passed — was administered, at the plaintiff's request, in New York City. The oral exam — which the plaintiff failed — was administered several years later in St. Louis, Missouri. After failing the oral exam (he in fact failed the oral exam twice), the plaintiff brought an action seeking equitable relief compelling the defendant to disclose the reasons why plaintiff had failed the oral exam and compelling defendant to certify the plaintiff as a specialist in internal medicine.

The court held:

> "[T]he strength of plaintiff's position must depend upon whether the oral and written examinations should be considered as a unit so that a claim of abuse in administration of the former could properly 'arise' out of the latter." 421 F.2d at 358.

The court rejected the plaintiff's argument that the oral and written exams were closely interconnected so that the claim against the defendant could be said to arise out of the New York City exam because: (a) the tests were administered in different states; (b) the written exam was given in New York City at the plaintiff's request; (c) the oral exam was given at a place convenient to the defendant board's two examining physicians; (d) four years had elapsed between the two exams; and, perhaps most importantly, (e) the nature of the two exams was so different that they could not possibly be said to have been interdependent. The written exam was graded by purely objective criteria, while the oral exam, of necessity, was graded by the essentially subjective observations of the two examining physicians. Success on the former could not control success on the latter.

In Harry Winston, Inc. v. Waldfogel, supra, the district court explained that the New York courts take a "broad view" of the applicable transaction for purposes of

the "arising under" requirement of CPLR 302(a)(1). Essentially the court determined that the New York courts will find that a cause of action does not arise out of a transaction of business in New York only where the business done in New York bears no relation to the transaction giving rise to the cause of action. Id. at 477. Here it cannot be said that the provision in the settlement agreement with respect to the continued effectiveness of the employment agreement bears no relation to Norman's breach of his employment obligations. While in Fontanetta there was in fact no connection between the written exam given in New York and the failed oral exam and no basis for finding that the cause of action concerning the failed oral exam arose out of the Board's transaction of business in New York in connection with the written exam, such is not our case. Here the employment agreement and Settlement Agreement were inextricably linked together in a writing negotiated and signed in New York between the parties. The purpose of the writing was to continue Norman's employment obligations as a condition of the March 6, 1972 settlement. It is alleged that he breached the employment contract and the fiduciary duties which that agreement imposed upon him. In doing so he also clearly breached one of the terms of the Settlement Agreement. Thus the Fontanetta holding is clearly inapposite.

In the case at bar, the continued vitality of the employment agreement after March 6, 1972 depended upon the aforequoted provision in the Settlement Agreement. But for that provision, there simply would have been no further employment of Norman as vice president of Ornament. The claims against Norman on the basis of his employment obligations must therefore be said to have "arisen" from the Settlement Agreement — concerning which Judge Stewart concedes that Norman transacted business in New York. Judge Stewart's conclusion that the Settlement Agreement and the employment contracts are "separate and distinct" is therefore simply erroneous.

Consequently, for all claims for relief arising out of the employment contract (and/or Settlement Agreement), the New York courts (and consequently this court sitting in diversity) are vested with jurisdiction to decide all issues with respect to such causes of action. The third claim for relief set forth in the amended complaint (¶¶22-26) unambiguously arises from the employment contract. Moreover, the employment contract established the fiduciary relationship between Norman and Ornament, and consequently between Norman and Lehigh, which serves as the foundation

for the sixth and eighth claims for relief (¶¶45-48, 51-56).[6/] Without the relationship established contractually, Norman could not be charged with failure to fulfill fiduciary duties as set forth in the sixth and eighth claims for relief. Therefore, those claims likewise arise out of the employment contract[7/] and jurisdiction exists in this court to adjudicate them. Cf. ECC Corp. v. Slater Electric, Inc., 336 F. Supp. 148, 151-52 (E.D. N.Y. 1971).

6/"The concept of cause of action or claim for relief arising from an act enumerated in CPLR 302(a) should be broadly construed to cover an entire transaction so that, when possible, the entire dispute may be settled in a single litigation." 1 Weinstein, Korn & Miller, New York Civil Practice ¶302.16 at 3-112.

7/Two theories of recovery are reflected in the sixth and eighth claims for relief. The first theory is breach of the contractually fixed relationship between the parties. Jurisdiction lies under CPLR 302(a)(1) as to that aspect of the claims for relief. The second theory of recovery encompassed in the sixth and eighth counts lies in tort and involves essentially breach of fiduciary duty and usurpation of a corporate opportunity. For these business tort aspects of the sixth and eighth claims, jurisdiction lies under CPLR 302(a)(3)(ii).

II. EVEN THOUGH NOMINALLY FUNCTIONING AS THE VICE PRESIDENT OF ORNAMENT, NORMAN BIRENBAUM'S ACTIVITIES IN NEW YORK SUBSEQUENT TO MARCH 6, 1972 IN FURTHERANCE OF THE SCHEME TO DESTROY ORNAMENT AND MILK LEHIGH FOR HIS OWN BENEFIT CONSTITUTED THE TRANSACTION OF BUSINESS BY HIM IN NEW YORK IN HIS INDIVIDUAL CAPACITY AND SUBJECT HIM TO IN PERSONAM JURISDICTION FOR ALL CLAIMS ARISING OUT OF THOSE ACTIONS.

While Judge Stewart was perfectly correct in holding that an individual's transaction of business in New York solely as an officer of a corporation does not create personal jurisdiction over that individual, appellants have alleged and argue that Norman's activities in New York were not limited to the affairs of Ornament. Rather it has been alleged that during his visits to New York Norman engaged in activities which, in effect, were in violation of his fiduciary responsibilities to Ornament and appellants. Appellants contend that during four visits to New York between March and December 1972 Norman acted in furtherance of the conspiracy to destroy Ornament and milk Lehigh for his own benefit. For example, during these trips Norman encouraged Lehigh to abandon its leather stripping business, and he took various steps to start up the business of Louran. (A 68-70.)

Appellants' allegations are sufficient to sustain in personam jurisdiction over Norman in New York. When a

defendant engages in acts in his personal capacity or for his personal benefit -- out of which personal acts a claim arises -- the New York courts may exercise personal jurisdiction over that defendant despite the fact that, while in the state, he may also have been acting in an official capacity for a corporation.

In United States v. Montreal Trust Company, 358 F.2d 239 (2d Cir. 1966), defendant Klein, the managing director of United Distillers, Ltd. ("United"), a publicly owned Canadian company which operated a distillery in Canada, as part of a scheme to divert funds to relatives of his, sent two agents into New York. While these agents were also the contractual agents of United, it was held that insofar as those agents engaged in activities involving payments to Klein's relatives and friends they were Klein's personal representatives. The Court of Appeals noted, "it would be ironic, indeed, if the very corporations whose funds Klein is charged with diverting were to supply him with the shield against suit for tax liability allegedly incurred in connection with this purported breach of his fiduciary duty." Id. at 243.

Similarly, in the case at bar, it would be ironic if Norman's contacts with this state were to be insulated,

for jurisdictional purposes, by the corporate shield of Ornament, the corporation he was seeking to subvert. Consequently, personal jurisdiction should be found over Norman by reason of his visits to New York, ostensibly as a fiduciary of Ornament, where he engaged in acts contrary to the interests of Ornament.

III. NORMAN BIRENBAUM'S CONDUCT IN APPROPRIATING ORNAMENT'S LEATHER STRIPPING BUSINESS AND IN CONSPIRING WITH HIS BROTHER TO DESTROY THE REST OF THE BUSINESS OF ORNAMENT TO LEHIGH'S DETRIMENT WARRANTS THE ASSERTION OF JURISDICTION UNDER CPLR 302(a)(3)(ii).

A. The Substantive Counts - Breach of Fiduciary Duty and Appropriation of a Business Opportunity.

In order to satisfy the requisites for 302(a)(3)(ii) jurisdiction, a plaintiff must demonstrate that (1) defendant committed a tortious act outside of New York; (2) that the tort caused injury to plaintiff within New York; (3) defendant expected or should reasonably have expected the tortious act to have consequences within New York; and (4) defendant derives substantial revenue from interstate or international commerce. Judge Stewart agreed with appellants "that commercial tortious conduct committed outside the state involving breach of fiduciary duty and appropriation of business opportunity may be covered by Section 302 in an appropriate case." (A 84; 389 F. Supp. at 804.) The court held, however, that the torts allegedly committed by Norman did not result in injury within New York and that Norman could not be regarded as deriving substantial income from interstate commerce. (A 84-86; 389 F. Supp. at 804-805.)

Appellants explained below that Ornament, though separately incorporated in Massachusetts (by the Birenbaums

before their involvement with Lehigh and Colonial), was operated as a mere department of Lehigh. Colonial owned all of the stock of Ornament (and its sister Massachusetts corporations) and Lehigh owned all of the stock of Colonial. Lehigh exercised complete control over Ornament, dictating who its officers and directors would be, the nature of its business, the details of its budget, and the auditing periods and methods to be employed. But most important for our purposes, Lehigh had total control of the purse strings. For Ornament to spend money it needed Lehigh's approval; but even more significant, Lehigh had to provide the funds. The financial results of Ornament's business, whether profit or loss, inured directly to Lehigh. "The financial results of Ornament were consolidated directly into the financial results of Lehigh." (Tardiff Affidavit, ¶ 2; A 66.) If, Ornament lost money, the consequences were suffered by Lehigh (and its stockholders). Realistically viewed, Ornament was but a name; the money and property allegedly appropriated by defendants came from the coffers of Lehigh which is in fact the only injured party. But for Lehigh there would have been no conspiracy because there would have been no victim, no source of revenue.

The entire focus of the Birenbaum conspiracy was upon the assets of Lehigh. Any other view of the situation enshrines a legal fiction, the Ornament corporate charter, for no apparent purpose whatever. Judge Stewart's view of the facts allows Norman to use Ornament's corporate existence as a shield to insulate his fraudulent and deceitful acts from scrutiny in the forum where the real injury was suffered. Such a result turns on its head the rule as regards when one should pierce the corporate veil.[8/] Rather than look through Ornament to Lehigh to reach the perpetrator of a fraud committed against Lehigh, the court below holds that when the faithless fiduciary uses a corporate vehicle to commit his unlawful acts the courts must recognize the sanctity of the corporate tool even if it means the wrongdoer will escape the jurisdiction of the court of the victim's forum. We do not believe that result makes practicial sense, was intended by the New York legislature or would be sanctioned by the New York State courts.

8/ The essential rationale of rules authorizing disregard of the corporate entity is that to do otherwise would create an injustice. See People v. North River Sugar Refining Co., 121 N.Y. 696, 24 N.E. 1099 (1899).

The authority relied upon by the court below does not support the incongruous result reached. We agree with Judge Stewart that the injury suffered in New York must be direct rather than remote or consequential. (A 84; 389 F. Supp. at 804.) However, we submit that the mere existence of Ornament — the vehicle for the execution of the fraud — does not militate against a finding that the injury inflicted was suffered directly in New York by Lehigh — the intended victim of the fraud.

American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971), and the cases cited therein, relied upon below, is clearly distinguishable. That case only stands for the proposition that allegations of unfair competition on the part of defendant directed against the activities of the out of state operations of plaintiff will not subject defendant to CPLR 302(a)(3)(ii) jurisdiction simply because such unfair conduct may also have had a consequential financial effect in New York. As explained in Black v. Oberle Rentals, Inc., 55 Misc.2d 398, 400, 285 N.Y.S.2d 226, 229 (Sup. Ct., Onondaga Co. 1967), the statute "looks to the imparting of the original injury within the State of New York and not resultant damage, in order that jurisdiction might be effectuated."

As the Black court explained, when a New York resident is physically injured in an accident occurring in another state and then returns to New York where resultant pain, suffering, loss of earnings and the like transpire, he cannot invoke CPLR 302(a)(3)(ii) jurisdiction.

Properly analyzed, the "accident" here at issue occurred not in Massachusetts where the conspirators did no more than, e.g., run the red light, but in New York where they, in effect, collided with the Lehigh treasury. Ornament should only be regarded as the vehicle they were using. The fact that it bore a Massachusetts license plate should make no legal difference. See General Motors Acceptance Corp. v. Richardson, 59 Misc.2d 744, 300 N.Y.S.2d 757 (Sup. Ct., Monroe Co. 1969).

Moreover, this is not a case where a third party dealing at arms length with a subsidiary commits a tort upon such subsidiary. Here Norman was an insider intimately aware of the relationship between Ornament and Lehigh. When the acts which he is alleged to have committed were performed, he knew where the injury would fall; indeed he directed that injury against Lehigh.

It must also be kept in mind that when considering whether a defendant's conduct is such as to subject him to in personam jurisdiction in the New York courts "the test is qualitative rather than quantitive." Gasarch v. Ormand Industries, Inc., 346 F. Supp. 550, 553 (S.D.N.Y. 1972). Here the qualitative nature of the acts alleged to have been commited by Norman were so instinct with fraud and bad faith directed against Lehigh that to subject Norman to in personam jurisdiction is entirely appropriate and consistent with the concepts of fairness and due process.

With respect to the jurisdictional requirement that a defendant derive substantial revenue from interstate commerce, appellants presented evidence that Louran was engaged in interstate commerce. (A 70.) The court below decided, however, that Louran's interstate business could not be attributed to Norman in order to satisfy the jurisdictional requisite of CPLR 302(a)(3)(ii). We submit that in this regard too it committed error.

Norman concedes that:

> "Since July 1973 . . . I have been President, Treasurer and sole stockholder of Louran Corporation . . . "
> (A 55, ¶ 5.)

Despite protestations to the contrary, it is clear that the

identities of Louran and Norman coalesce with respect to the wrongs alleged in the amended complaint.

The substantial revenue from interstate commerce requirement is designed to expand the jurisdiction of the New York courts over nondomiciliary defendants who can afford to litigate in New York. General Motors Acceptance Corp. v. Richardson, supra, 59 Misc.2d at 748-749, 300 N.Y.S.2d at 761-762; 1 Weinstein, Korn & Miller, supra, ¶ 302.102 at 3-102. Cf. Schroeder v. Loomis, 46 Misc.2d 184, 188, 259 N.Y.S.2d 42, 48 (Sup. Ct., Broome Co. 1965). (We note in passing that Norman's representation by the distinguished and expensive counsel appearing on his behalf in this action attests to his ability to litigate in New York without undue hardship.)

Norman set up Louran as the vehicle for committing an act of corporate piracy. Without Louran there would have been no tortious act, no breach of duty and no injury. Louran in essence was the instrument used to effect Norman's tortious conduct against appellants. Moreover, Louran is a corporation wholly owned by Norman. These circumstances establish all the predicates for piercing the corporate veil. The use of a corporate entity to engage in fraudulent acts should not be condoned

by the courts, and it is well established that in such circumstances the courts may look behind the corporate shell to impose liability. Modlen v. Licht, 224 App. Div. 614, 231 N.Y.S. 265 (2d Dept. 1928); Siegel v. Ribak, 43 Misc.2d 7, 249 N.Y.S.2d 903 (Sup. Ct. Kings Co. 1964).

The opinion below permits Norman to escape the jurisdiction of the New York courts by allowing him to use a second corporate shield for his malefactions against Lehigh. Ignoring the facts which fall well within the traditional rationale for piercing the corporate veil, Judge Stewart again enshrines a legal fiction at the expense of reality and common sense.

We submit that this court should reverse Judge Stewart's rulings as to the substantive allegations of the sixth and eighth counts of the amended complaint. Norman would thereby be stripped of the protective mantle he has erected from the Ornament and Louran corporate charters in order to shroud his illicit acts from judicial scrutiny in the most appropriate forum.

Under appellants' theory of the case, which we submit is correct, Norman, by his conduct in connection with Louran and Ornament's leather stripping business and by his

silence in connection with David's malefactions, committed tortious acts having injurious consequences in New York. Thus, the New York court may exercise in personam jurisdiction over Norman with respect to the sixth and eighth claims for relief.

B. The Conspiracy Counts - Appellants Made a Sufficient Showing of the Existence of a Conspiracy Between Norman and David.

Appellants argued below that "since co-conspirators act as agents for each other in all acts in furtherance of the conspiracy, David's acts are attributable to Norman" for jurisdictional purposes. (A 88; 389 F. Supp. at 806.) Appellants' position was that since David's conduct as alleged in the amended complaint was such as to clearly subject him to long-arm jurisdiction under CPLR 302(a)(3)(ii),[9/] Norman as a co-conspirator may be charged with such acts for jurisdictional purposes.

David is charged with involvement in the same tortious conduct as Norman, including certain direct actions not charged against Norman. His actions clearly had direct New York

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9/ David was personally served in New York on January 28, 1974 while he was in the state on business. Therefore, with respect to David and his Spanish companies, no long-arm problems present themselves.

consequences; e.g., Lehigh directly provided him with letters of credit to pay for imported shoes which funds were used by him for his Spanish operations. (A 12, ¶ 40.) Furthermore, he clearly derives substantial revenue from his Spanish shoe business. Finally, from the intentional nature of the tortious acts charged to him, it is clear that David should reasonably have expected those acts to have injurious consequences in New York.

Norman is alleged to have engaged in a conspiracy with David to commit the very acts giving rise to long-arm jurisdiction over David (¶¶ 16, 49). Since co-conspirators act as agents for each other with respect to all matters connected with the subject matter of the conspiracy, David's acts in furtherance of the conspiracy may be attributed to Norman. See Green v. Davies, 182 N.Y. 499, 75 N.E. 536 (1905); Bracket v. Griswold, 112 N.Y. 454, 20 N.E. 376 (1889); Nederlandsche Handel-Maatschappij N.V. v. Schreiber, 17 A.D.2d 783, 232 N.Y.S.2d 644 (1st Dept. 1962). Consequently, appellants contended that jurisdiction exists over Norman with respect to all causes of action arising out of the conspiracy.

Judge Stewart isolated two issues for resolution on this subject:

> "Two issues arise here in connection with plaintiffs' jurisdictional theory. First, whether plaintiffs have made a sufficient showing of a conspiracy and defendant Norman's involvement in that conspiracy to warrant our hinging personal jurisdiction over Norman on that theory. Second, whether a conspiracy claim can give rise to the kind of attribution of acts by a co-conspirator with sufficient contacts in New York to another nondomiciliary conspirator in order to obtain personal jurisdiction over that defendant." (A 90; 389 F. Supp. at 805.)

On the latter issue he agreed with appellants, holding that "the acts of a co-conspirator may be attributed to a defendant in an appropriate case for purposes of obtaining personal jurisdiction over that defendant under the long-arm statute." (A 91; 389 F. Supp. at 806-07.) Judge Stewart went on to hold, however, that as a factual matter appellants had failed to <u>prove</u> the conspiracy existed thereby failing to satisfy the jurisdictional prerequisite. (A 92; 389 F. Supp. at 807.)

Judge Stewart's holding in the latter regard suffers from a two-fold infirmity. In the first place, appellants did not, as Judge Stewart suggests, simply make a "bland assertion" that Norman and David were co-conspirators in a plan to exploit Ornament. (A 92; 389 F. Supp. at 807.) It was alleged and supported by affidavit that Norman and David were brothers engaged in a single enterprise (A 6), that they <u>jointly</u> sold

this enterprise to Lehigh (A 7), that David conducted the negotiation of the terms of the transaction for himself and Norman (A 66-67), that Norman and David then were appointed officers of the entity they had sold to Lehigh (A 7, 67), that they jointly were entrusted with responsibility for conducting the affairs of that entity (A 9), that the entity was exploited to the advantage of certain foreign enterprises of David (A 10-13), that a corporate business opportunity of that enterprise had been usurped to the advantage of a business enterprise of Norman's (A 68-69) and that such usurpation took place through the joint efforts of Norman and David (A 68). In their totality these facts as alleged lead to an inference that Norman and David cooperated in their activities. At this stage of the litigation nothing more should be required to be shown to support long-arm jurisdiction on the basis of a conspiracy between Norman and David. Whether or not Norman actually participated in the alleged conspiracy is an issue for proof at trial and should not be decided on this motion. It is to be recalled that "we are concerned solely with the problem of the court's jurisdiction over the person of a nonresident defendant and not with the question of his ultimate liability to a particular plaintiff."

Longines-Wittnauer Co. v. Barnes & Reinecke, Inc., supra at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21.

But even if the foregoing allegations and facts standing by themselves do not support long-arm jurisdiction, Judge Stewart erred in summarily determining the question and not permitting discovery and a hearing on this and other issues involved in this case. The district court could have ordered that the matter of personal jurisdiction be resolved at a full hearing "including opportunity for oral testimony and cross-examination." Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 589 (2d Cir. 1965). See Murray v. Plessey, Inc., 40 A.D.2d 811, 338 N.Y.S.2d 311 (1st Dept. 1972). Questions of fact concerning personal jurisdiction, which spell the death-knell of appellants' case against Norman in New York, should not have been determined against appellants in a summary fashion; instead, as the Third Department has stated, "appellant should have the opportunity to present its proof in more rounded form, as, indeed, should respondent." Crossley Glove Co. v. Wakefield Leathers, Inc., 30 A.D.2d 598, 599, 290 N.Y.S.2d 319, 321 (3d Dept. 1968). See also Grandoe Glove Corp. v. Great Eastern Financial Corp., 34 A.D.2d 593, 308 N.Y.S.2d 467 (3d Dept. 1970); Cf. Noble v. Singapore Resort Motel, 21 N.Y.2d 1006, 238 N.E.2d

328, 290 N.Y.S.2d 926 (1968). Moreover, where such a hearing proves necessary, plaintiff is entitled to full discovery on the jurisdictional issue. Gershuny v. Compagnia Italia Dei Grandi Alberghi, 53 Misc.2d 653, 656, 279 N.Y.S.2d 504, 506 (Sup. Ct., Wchst'r Co. 1967). See also Potter Real Estate Co. v. O & S Bearing Manufacturing Co., 32 A.D.2d 883, 302 N.Y.S.2d 178 (4th Dept. 1969). The use of discovery to disclose jurisdictional facts has been expressly authorized in the federal district courts under the Federal Rules of Civil Procedure. Goldstein v. Compudyne Corp., 262 F. Supp. 524 (S.D.N.Y. 1966).[10/]

As with proof of David's agency on behalf of Norman for jurisdictional purposes, the facts necessary to prove a conspiracy were peculiarly within the possession of the conspirators. The New York courts would therefore permit discovery, especially given the particular matrix of facts thus far alleged which evidence a "sufficient start". Badger v. Lehigh Valley R. Co., 45 A.D.2d 601, 360 N.Y.S.2d 523 (4th Dept. 1974). See also Peterson v. Spartan Industries, 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974).

10/ Although this point was raised below, Judge Stewart's opinion makes no reference to the subjects of discovery concerning jurisdictional facts nor a hearing to resolve issues of fact.

The essence of a conspiracy is defined as a concert or combination to cause injury with actual damage resulting. Pfennig v. Motto, 220 N.Y.S.2d 64, 66 (Sup. Ct., Suffolk Co. 1961). The intent to participate is an integral part of a claim based on conspiracy. Bedard v. La Bier, 20 Misc.2d 614, 617, 194 N.Y.S.2d 216, 220 (Sup. Ct. Clinton Co. 1959). In this case, the elements of acting in concert and intent to participate could not possibly be proven unless and until discovery is taken.

Furthermore, acts in furtherance of a conspiracy are not generally such that their existence is publicly broadcast. See Bedard v. La Bier, supra, where the court noted that conspiracies from their very nature are entered into in secret. Indeed, the entire jurisdictional issue in this case is rather complex. For example, given his position of trust, Norman's failure to inform appellants of David's actions in derogation of Ornament's interests might be regarded as an "act" in furtherance of the conspiracy if the agreement giving rise to the conspiracy can be proven. See id., where the court observed that "it is entirely immaterial how or in what form the action of the conspirators manifests itself if therefrom injury is inflicted and damages are sustained. Nor can it in the slightest degree affect the cause of action whether there

be a single act done pursuant to the conspiracy or a thousand."

Because this case does present a complex jurisdictional issue, "[d]iscovery is . . . desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." Peterson v. Spartan Industries, supra at 468, 354 N.Y. N.Y.S.2d at 908. Therefore, appellants should be afforded an opportunity to take discovery from Norman and David before being required to prove, to an extent further than already done, the conspiracy for jurisdictional purposes.[11/]

Judge Stewart stated that because of his finding on the issue of Norman's participation in the conspiracy he did not deem it necessary to reach the further issue of whether CPLR 302(a)(3)(ii) requires that the individual defendant (Norman) meet the requirement of substantial interstate or international revenue or whether it is sufficient that a co-

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11/ It is possible for this court to conclude that the questions of agency, the nature of Norman's activities in New York between March-December 1972, the activities of Norman prior to June 1973 in connection with setting up Louran, the interstate business of Louran, and Norman's relation to Louran also present factual issues requiring resolution after a hearing rather than a summary proceeding. In that event, this court should reverse and remand for discovery and trial on the issues of fact for jurisdictional purposes.

conspirator meets the requirement. (A 93, 389 F. Supp. at 807.) Since persons who combine and conspire to engage in concerted activities for the purpose of performing tortious acts are "united in interest" (Paliotto v. Hartman, 9 Misc.2d 963, 174 N.Y.S.2d 328 (Sup. Ct., Queens Co. 1957), it stands to reason that jurisdiction over one co-conspirator should vest the court with jurisdiction over the others without reference to whether each co-conspirator is individually deriving substantial revenue from interstate or foreign commerce.

In any event, even if this court should determine that Norman personally must satisfy the interstate revenue requirement, his leather stripping business meets the test. At the very least, discovery should have been permitted to ascertain to what extent Norman derives revenue from interstate or international commerce. See Badger v. Lehigh Valley R. Co., supra.

Accordingly, we submit that jurisdiction lies against Norman as to the first and seventh conspiracy claims for relief under CPLR 302(a)(3)(ii). Any doubts in this regard concerning appellants "proof" of the existence of a conspiracy should not be summarily resolved against them, but should be decided only after discovery and trial.

IV. WHEN NORMAN SENT A FALSE STATEMENT INTO NEW YORK WITH AN INTENT TO MISLEAD HIS ACTIONS CONSTITUTED THE COMMISSION OF A TORTIOUS ACT WITHIN THE STATE FOR PURPOSES OF CPLR 302(a)(2) JURISDICTION.

The amended complaint alleges that Norman and David, in connection with the misappropriation of Ornament's leather business, made false statements to Lehigh in New York. Appellants relied upon the New York case of Polish v. Threshold Technology, Inc., 72 Misc.2d 610, 340 N.Y.S.2d 354 (Sup. Ct., N.Y. Co. 1972) (quoting from Murphy v. Erwin-Wasey, Inc., 460 F.2d 661, 664 (1st Cir. 1972)) to predicate jurisdiction over Norman on the ground that:

> "'Where a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of the state, he has, for jurisdictional purposes, acted within that state.'" Id. at 612, 340 N.Y.S.2d at 356.

In this fashion, appellants sought to lay a basis for in personam jurisdiction over Norman under CPLR 302(a)(2) — even assuming the false statements were offered in Massachusetts and received through a medium of communication in New York.

Judge Stewart, however, found that the Polish case does not accurately represent New York law on this point. He determined, rather, that Kramer v. Vogl, 17 N.Y.2d 27, 215

N.E.2d 154, 267 N.Y.S.2d 900 (1966) is controlling. He interpreted Kramer v. Vogl as holding that "no tort was committed in New York where nonresidents made false representations outside of New York which induced plaintiff to rely upon those representations in New York, with resulting injury in New York." (A 94; 389 F. Supp. at 808.) He refused, therefore, to invoke CPLR 302(a)(2) jurisdiction over Norman.

Appellants most respectfully take issue with Judge Stewart's interpreation of Kramer v. Vogl and his conclusions as to the law of New York on this issue. In the first place, Polish and Kramer v. Vogl are clearly distinguishable on their facts. In Kramer v. Vogl, the tortious acts complained of were intentional false representations made by defendant to plaintiff in Paris that defendant's leather products would not be supplied to anyone else in the United States in competition with plaintiff. The contract negotiations and executions were conducted in Paris, and a letter confirming the conversation in which plaintiff was granted sole agency was later sent to New York. The court, citing a previous ruling in Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), said the statutory requirement in 302(a)(2) of a tortious act committed within the state was not synonymous with "a

tortious act without the state which causes injury within the state." Id. at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21.

The Kramer court granted defendant's motion to dismiss for lack of jurisdiction on the grounds that the false representations were made outside of the state and only confirmed by letter received in the state. The court attributed no jurisdictional significance to the shipment of goods into the state.

In Polish, by contrast, the alleged fraudulent statements made by defendants were contained in a letter mailed from New Jersey to plaintiff's New York office. The fraud was thus perpetrated when plaintiff became aware of the alleged misrepresentations upon reading the letter in New York and acting in reliance on those statements. The false statement in Kramer v. Vogl, on the other hand, took place entirely in Paris. The subsequent letter added nothing to what had already been completed and relied upon. In circumstances where a letter, telephone call or other medium of communication containing a false statement is prepared outside of New York and is sent to, received in and relied on in New York, the controlling authority is Polish v Threshhold

Technology, Inc., supra. It is only where a medium of communication containing a false statement merely confirms or reiterates a statement already made out of the state that Kramer v. Vogl is controlling.

This position has a logical consistency with and is reinforced by a line of authority in the federal courts governing the issue of proper venue in securities fraud cases. In cases arising under the federal securities laws, where an issuer of securities, or an underwriter or other participant in the distribution of such securities, has made a false or misleading statement in a prospectus, and that prospectus is mailed from Forum X to a recipient in Forum Y who, in reliance on that prospectus, purchases securities, the recipient can maintain an action in Forum Y. The receipt of the prospectus and reliance thereon in Forum Y satisfy the venue requirements of 15 U.S.C. § 77v. Zorn v. Anderson, 263 F. Supp. 745 (S.D.N.Y. 1966). Cf. Puma v. Marriott, 294 F. Supp. 1116, 1120-1121 (D. Del. 1969). See also Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961) where a telephone call made from Texas to Alabama was deemed sufficient to lay venue in Alabama.

The allegations against David and Norman fall squarely within the factual matrix of the Polish rule and the venue rule of the federal securities laws. Consequently, Judge Stewart erred in holding that any false statements made outside the state by David or Norman and received in the state by Lehigh do not support in personam jurisdiction over Norman under CPLR 302(a)(2).

Moreover, on this point of false representations with respect to the leather stripping business, appellants have asserted by affidavit that Norman personally made such misrepresentations at a Christmas party — business meeting held in New York in December of 1972 (A 70). In his reply affidavit Norman made a simple bald denial of ever having made such misrepresentations. Judge Stewart failed to address himself to these two contradictory statements. Given the critical jurisdictional significance of these representations, Judge Stewart should have either found that appellants had made out a prima facie case of jurisdiction, the proof of which would have to await trial or, at the very least, he should have conducted an evidentiary hearing. A matter of such critical importance should not be decided "solely on the basis

of inconclusive preliminary affidavits." Peterson v. Spartan Industries, Inc., supra at 467, 310 N.E.2d at 515, 354 N.Y.S.2d at 908. If Norman had made any false statements in New York with respect to inducing Ornament to quit the leather stripping business, then clearly a tortious act would have been committed in the state and jurisdiction would be proper under CPLR 302(a)(2).

CONCLUSION

For the foregoing reasons, we urge this court to hold that the amended complaint sets forth specific allegations against Norman justifying the exercise of in personam jurisdiction over him in New York. Through the acts of his agent, his brother David, and his own acts in connection with the Settlement Agreement and post-March 6, 1972 activities in New York, Norman is subject to the jurisdiction of the New York courts under CPLR 302(a)(1) for all causes of action arising out of the employment agreement (the third, sixth and eighth claims for relief). Through his own acts in connection with establishing Louran, Norman is subject to the jurisdiction of the New York courts under CPLR 302(a)(2) and (a)(3)(ii) for all causes of action arising out of injury suffered by appellants in connection with Ornament's withdrawal from the leather stripping business (the sixth and eighth claims for relief). By reason of the conspiracy with his brother David, Norman is subject to the jurisdiction of the New York courts under CPLR 302(a)(3)(ii) for all causes of action arising out of injury suffered by plaintiff as a result of acts carried out in furtherance of the conspiracy (the first and seventh claims for relief). Since in personam jurisdiction

over Norman exists, the district court erred in granting Norman's motion to dismiss. Accordingly, we urge this court to reverse the judgment below with costs.

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Respectfully submitted,

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